Nos. 90-201
90-202

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLONIAL VILLAGE, INC.,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MOBIL LAND DEVELOPMENT CORPOPORATION,
Petitioner,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

MARVIN J. GERSTIN and MARVIN GERSTIN ASSOCIATES, INC.,
Petitioners,

v.

GIRARDEAU A. SPANN, the METROPOLITAN WASHINGTON PLANNING & HOUSING ASSOCIATION, INC., and the FAIR HOUSING COUNCIL OF GREATER WASHINGTON,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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APPENDIX TO PETITIONS

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 30, 1990 Decided March 13, 1990

No. 88-7257

GIRARDEAU A. SPANN, *et al.*,
APPELLANTS

v.

COLONIAL VILLAGE, INC., *et al.*

No. 88-7260

GIRARDEAU A. SPANN, *et al.*,
APPELLANTS

v.

MARVIN J. GERSTIN, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action Nos. 86-2917 & 86-3196)

Niki Kuckes, with whom *William H. Jeffress, Jr.*, *David G. Welbert* and *Kerry Alan Scanlon* were on the brief, for appellants.

Reuben B. Robertson for appellees, Colonial Village, Inc. and Mobil Land Development Corporation in No. 88-7257.

Peter L. Sissman for appellees, Marvin Gerstin Associates and Marvin Gerstin in No. 88-7257 and No. 88-7260.

Before: WALD, *Chief Judge*, RUTH B. GINSBURG and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RUTH B. GINSBURG.

GINSBURG, RUTH B., *Circuit Judge*: Plaintiffs-appellants seek to pursue claims that real estate advertisements placed by defendants-appellees featuring white models to the exclusion of black models violated the Fair Housing Act of 1968 (FHA), 42 U.S.C. §§ 3601-31. The district court held the claims time-barred. We reverse that determination and remand for further proceedings.

The appeal involves consolidated actions against two unrelated sets of defendants. In the first action, commenced in October 1986, the co-defendants are Colonial Village, Inc. (Colonial), owner and manager of a residential condominium in Arlington, Virginia, and Mobil Land Development Corporation (MLDC); Colonial is wholly owned by MLDC which, in turn, is wholly owned by the Mobil Corporation, a publicly-held corporation. In the second action, commenced in November 1986, the co-defendants are Marvin J. Gerstin and the advertising agency he is alleged to own and control, Marvin Gerstin Associates, Inc. Both sets of defendants are charged with running discriminatory ads regularly in *The Washington Post* from January 1985 through the spring of 1986.

Plaintiffs are Girardeau A. Spann, a black resident of the District of Columbia, the Fair Housing Council of Greater Washington, and the Metropolitan Washington

Planning & Housing Association. Both organizational plaintiffs are non-profit corporations dedicated to ensuring equality of housing opportunity through education and other efforts. Requesting injunctive relief and damages, plaintiffs rely primarily on section 804(c) of the FHA, which declares it unlawful

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make such preference, limitation, or discrimination.

42 U.S.C. § 3604(c). Plaintiffs additionally assert 42 U.S.C. §§ 1981, 1982 in support of their claims.

The procedural course of this litigation has not been smooth. We describe it summarily. After consolidating the two cases in January 1987, the district court scheduled briefing on dispositive motions. In May 1987, that court ruled for defendants 1) dismissing for failure to state a claim upon which relief can be granted plaintiffs' pleas under 42 U.S.C. §§ 1981, 1982, and 2) granting summary judgment striking out the FHA claims as time-barred. *Spann v. Colonial Village, Inc.*, 662 F.Supp. 541 (D.D.C. 1987).

Plaintiffs' appeal from the district court's May 1987 decision was aborted when Colonial moved in this court to dismiss for want of the requisite finality. Colonial pointed out that the district court had left unaddressed co-defendant MLDC's objection that MLDC was neither properly served nor amenable to service in the District of Columbia. A motions panel of this court, in response to Colonial's plea, dismissed the appeal "without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291." *Spann v. Colonial Village, Inc.*, Nos. 87-7118 & 87-7119 (D.C. Cir. Apr. 6, 1988).

The district court then endeavored to "make[ ] the judgment in these cases final." In an October 1988 deci-

sion, that court resolved two matters: (1) it denied MLDC's motion to dismiss or quash service of process; and (2) it dismissed the Gerstin defendants' motion for sanctions under FED. R. CIV. P. 11. *Spann v. Colonial Village, Inc.*, 124 F.R.D. 1, 2 (D.D.C. 1988). As to the former, the district court concluded that, because MLDC was notified of the suit through service on Colonial, its subsidiary, "service was properly effected on [MLDC]." *Id.* at 3. On sanctions, the district court found the Gerstins' application "frivolous," because plaintiffs' assertions had a "reasonably defensible basis in fact and law." *Id.*

Plaintiffs once again appeal. We take up first the question of standing and explain why the organizational plaintiffs meet that threshold requirement. We next address the timeliness of the appeal, and the issue of personal jurisdiction over MLDC. Finally, we consider the vitality of the claims in suit, and hold that the FHA claims were not pursued too late.

Standing

The initial issue in these cases is whether plaintiffs possess standing to invoke the jurisdiction of the federal courts. No "prudential standing" inquiry is in order, however, because Congress intended standing under the Fair Housing Act to extend to the full limits of Article III. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). We therefore consider only core Article III standing.

The plaintiff organizations, the Metropolitan Washington Planning & Housing Association (MWPHA) and the Fair Housing Council of Greater Washington (FHC), assert standing to sue on their own behalf, and we turn now to those assertions. An organization has standing on its own behalf if it meets the same standing test that applies to individuals. The organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Accordingly, just as an individual lacks standing to assert " 'generalized grievances' about the conduct of Government," *see Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217 (1974), so an "organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (citing *Sierra Club v. Morton*, 405 U.S. 727, 738-40 (1971)); *see Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 255 (D.C. Cir. 1983) (private organization with "vibrant interest in," but not "adversely affected" by, challenged agency action lacks standing). If, however, an organization points to a "concrete and demonstrable injury to [its] activities," not "simply a setback to the organization's abstract social interests," the organization will have passed through the first gateway. *Havens*, 455 U.S. at 379.

That the alleged harm affects the organization's non-economic interests — for example, its interest in encouraging open housing — "does not deprive the organization of standing." *Id.* at 379 n.20 (internal citation omitted). An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation. *See Haitian Refugee Center v. Gracey*, 809 F.2d 794, 799 n.2 (D.C. Cir. 1987) (opinion of Bork, J.). *Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action. *See Havens*, 455 U.S. at 379.

Plaintiff organizations have alleged such injuries here. We first summarize, and then elaborate on, the organizations' allegations. Both MWPHA and FHC have charged that defendants' preferential advertising tended to steer black home buyers and renters away from the advertised complexes and thus impelled the organizations to devote

resources to checking or neutralizing the ads' adverse impact. The organizations also claimed that the advertisements required them to devote more time, effort, and money to endeavors designed to educate not only black home buyers and renters, but the D.C. area real estate industry and the public that racial preference in housing is indeed illegal.

Relating the organizations' claim to standing in more detail, we begin with the statute. Section 804(c) of the Fair Housing Act prohibits any advertisement that "indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). Section 812(a) of the Act expressly provides a private right of action to enforce the rights created by Section 804. *See id.* § 3612(a).

Plaintiffs complained that the "repeated and continued depiction of white models and the complete absence of black models" in defendants' advertisements "indicate a preference based on race" in violation of the statute. Colonial Complaint ¶ 12, Joint Appendix (J.A.) at 12; Gerstin Complaint ¶ 7, J.A. at 22. Plaintiffs crucially alleged that these advertising practices "interfered with plaintiff FHC and MWPHA's efforts and programs intended to bring about equality of opportunity for minorities and others in housing" and required plaintiffs "to devote scarce resources to identify and counteract defendants' advertising practices." Colonial Complaint ¶ 17, J.A. at 13; Gerstin Complaint ¶ 27, J.A. at 22.

In affidavits submitted to the district court, the executive directors of MWPHA and FHC further related how defendants' advertisements concretely injured the organizations by depleting scarce resources, apart from generating expenditures in these enforcement actions.[1] The

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[1]This court and the district court may properly consider affidavits submitted by the parties, in addition to the complaint, to resolve the standing question. The courts may also permit plain-

directors first charged that defendants' white-only advertising "reinforces archaic stereotypes of segregation in housing" and "encourages discriminatory attitudes." Declaration of Larry Weston, Executive Director MWPHA ¶ 9, J.A. at 118; Declaration of Patricia A. Horton, Executive Director FHC ¶ 11, J.A. at 126. MWPHA's director then alleged that "[t]his directly decreases the effectiveness of the MWPHA's efforts to educate the real estate industry and the community" about laws prohibiting discrimination in housing and "necessitates increased educational efforts to counteract the influence of defendants' discriminatory ads." Declaration of Larry Weston ¶ 9, J.A. at 118. FHC's director made similar allegations about the ads' effects on FHC's education programs.

Both organizations claimed that the advertising "impacts adversely" on the organizations' "real estate testing program by acting as a 'steering' method which discourages black home buyers and renters before they ever reach a particular complex, necessitating the [organizations] to broaden the scope of [their] efforts in order to reach all forms of discriminatory housing practices." Declaration of Patricia A. Horton ¶ 11, J.A. at 126-27; Declaration of Larry Weston ¶ 9, J.A. at 118. MWPHA and FHC reiterated, in line with *Havens Realty*, that they have been "frustrated by defendants' . . . practices," which have discouraged black home buyers and renters from considering defendants' housing and required the organizations to expend additional resources to identify and dispel this discouragement. *See Havens*, 455 U.S. at 379.

The "drain[s] on the organization[s'] resources" alleged here appear no less palpable or specific than the injuries

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tiffs to amend their complaints to make the necessary allegations. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975); *see also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 95, 113 n.25 (1979) (finding standing for some plaintiffs based on allegations in complaints "as illuminated by subsequent discovery" and permitting other plaintiffs "to amend their complaints to include allegations of actual harm").

asserted by the organizational plaintiff in *Havens*. *See Havens*, 455 U.S. at 363 (finding sufficient the following statement: "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices."); *see also Saunders v. General Services Corp.*, 659 F.Supp. 1042, 1052 (E.D. Va. 1987) (finding sufficient organizational plaintiffs' complaint allegations, which were substantially identical to those in this case); *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221 (4th Cir. 1981) (organization alleged sufficient injury due to increased time and expense necessary for it to monitor FDA activities under new agency regulation). In sum, increased education and counseling could plausibly be required, as we earlier indicated, to identify and inform minorities, steered away from defendants' complexes by the challenged ads, that defendants' housing is by law open to all. Educational programs might complementarily be necessary to rebut any public impression the advertisements might generate that racial discrimination in housing is permissible.

MWPHA and FHC thus do not simply claim that they are psychically injured by witnessing noncompliance with the Fair Housing Act. *Cf. Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1328 n.41 (D.C. Cir. 1986) (damage to interest in fuel conservation not injury); *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986) (injury founded on adverse psychological consequences arising from inadvertent support of immoral conduct with which appellants disagree too abstract to satisfy Article III). The organizations instead allege concrete drains on their time and resources. Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants' use of print media, are sufficiently tangible to satisfy Article III's

injury-in-fact requirement. *See Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (senior citizen assistance organization had standing where injury was based on programmatic concerns, not on purely ideological interests in the agency's actions).

This adequately asserted depletion of resources is also, as the courts in *Havens* and *Saunders* found, fairly traceable to the alleged racially-preferential advertising and likely to be redressed by court-ordered declaratory relief. The Supreme Court has noted that "in many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *See Allen v. Wright*, 468 U.S. 737, 751-52 (1984). Having made the suggested comparison in this case, we conclude that both plaintiff organizations have standing.[2]

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[2]Because we conclude that the organizations have standing on their own behalf, we do not decide whether individual plaintiff Spann or the organizations as representatives of their members possess standing. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977). Indeed, we could not resolve these questions without remanding to the district court to allow plaintiffs to amend their complaints or to supplement the record. *Cf. Havens*, 455 U.S. at 377-78 (remanding to "afford [two of the individual] plaintiffs an opportunity to make more definite the allegations of the complaint"). MWPHA and FHC have not clearly charged how the challenged advertisements "deprive[ ] [their members or constituents] of the benefits of living in a racially integrated community." Declaration of Larry Weston ¶ 10, J.A. at 118-19; Declaration of Patricia A. Horton ¶ 12, J.A. at 127. Plaintiff Spann has alleged only that he "incurred indignation" and "distress" as a result of the alleged violation. Colonial Complaint ¶ 16, J.A. at 13; Gerstin Complaint ¶ 26, J.A. at 22. Although "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth*, 422 U.S. at 500, we question whether Congress intended 804(c) to confer a legal right on all individuals to be free from indignation and distress. *But see Saunders*, 659 F. Supp. at 1053 (mere receipt of preferential advertising violates statute and thus confers standing). We have no doubt, however, that an individual plaintiff who alleged and later proved that an advertisement indicating a racial preference deterred her from seeking housing in the advertised property would possess standing. *See id.*

Like the organization in *Havens*, MWPHA and FHC must ultimately prove at trial that the defendants' illegal actions actually caused them to suffer the alleged injuries before they will be entitled to judicial relief. *See Havens*, 455 U.S. at 363 n.21. This effort will require, of course, proof that defendants violated the Act, *i.e.*, that to a "reasonable reader the natural interpretation of defendants' advertisements . . . is that they indicate a racial preference" or an intention to make such a preference. *See Saunders*, 659 F.Supp. at 1058 (quoting *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972)); *accord Ragin v. Steiner, Clateman and Assocs.*, 714 F.Supp. 709, 713 (S.D.N.Y. 1989) (question of fact for jury whether all white advertisements violate 42 U.S.C. § 3604(c)). MWPHA and FHC will also have to prove that this violation actually caused them to expend resources or to suffer some other concrete injury. For example, as previously noted, MWPHA and FHC might prove that the advertisements discouraged potential minority home buyers from attempting to buy homes at defendants' developments and forced the organizations to spend funds informing minority home buyers that the homes are in fact available to them. Or the organizations could show that the ads created a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase in the organizations' educational programs on the illegality of housing discrimination.

To conclude this discussion of standing, we return to our starting line (*see supra* p. 5) to underscore the difference between this suit and one presenting only abstract concerns or complaints about government policy or conduct. *Cf. Reservists to Stop the War*, 418 U.S. at 217; *Sierra Club*, 405 U.S. at 738-40; *Frothingham v. Mellon*, 262 U.S. 447 (1923). The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate

most acutely the separation of powers, which, the Supreme Court instructs, is the "single basic idea" on which the Article III standing requirement is built. *See Allen v. Wright*, 468 U.S. at 752; *Valley Forge Christian College*, 454 U.S. at 472. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that "[o]ur system of government leaves ... to the political processes." *Reservists to Stop the War*, 418 U.S. at 227.

Plaintiffs here do not seek to compel government action, to involve the courts in a matter that could be resolved in the political branches, or simply "to vindicate their own value preferences through the judicial process." *Sierra Club*, 405 U.S. at 740. Plaintiffs are private actors suing other private actors, traditional grist for the judicial mill. Their suit does not raise the concerns that may arise when a public agency or officer is sued to achieve change in a government policy. *Cf. Northwest Airlines v. FAA*, 795 F.2d 195, 203 n.2 (D.C. Cir. 1986). To the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys general like plaintiffs.[3] Although the Attorney General and the Department of Housing and Urban Development may enforce the Act, their resources are markedly limited. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). Congress decided, therefore, to rely primarily on "private suits in which, the Solicitor General [has noted,] the complainants act not only on their own behalf but also 'as private

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[3]We do not suggest that separation of powers concerns totally regress so long as (1) Congress, rather than the courts, declares who may sue, and (2) all parties are private rather than public actors. Even in the absence of encroachment by one branch on the domain of another, there may remain as a live issue the appropriate functions of each branch. While congressional intention to authorize an action between private parties thus may not suffice to meet Article III strictures, the will of the legislature "cannot be overlooked in determining whether [plaintiffs] have standing to sue." *Havens*, 455 U.S. at 373.

attorneys general in vindicating a policy that Congress considered to be of the highest priority.' " *Id.* (quoting Solicitor General's comments at oral argument).

Enforcement by private attorneys general has become a feature of many modern legislative programs. Congress has recognized the usefulness and the courts have acknowledged the propriety of reliance on an individual or group actually injured, or threatened with injury, to vindicate the public interest. *See, e.g., Allen v. State Board of Elections,* 393 U.S. 544, 556-57 (1969); *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 401-02 (1968); *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964). Indeed, such individuals and groups may assert the public interest even when their own interests do not precisely coincide. *See, e.g., Sanders v. FCC,* 309 U.S. 470, 476-77 (1940). Plaintiffs' interests here overlap with the public interest in open housing and nondiscriminatory advertising embodied in the Fair Housing Act. The policies of the Act and the concrete injuries alleged by the plaintiff organizations thus intertwine to support plaintiffs' standing to bring this suit.

Timeliness of Appeal

We turn next to the timeliness of this appeal. The Gerstin appellees say the appeal in the case against them is too late; MLDC, on the other hand, objects that appellants have come here too soon. We conclude that the case is properly before us as to all appellees.

Far from appealing "seventeen months too late," *see* Brief for Appellees Marvin Gerstin Associates, Inc. and Marvin Gerstin at 3, plaintiffs were unable to engage this court's review at an earlier time. The district court's May 1987 decision left issues open as to one of the defendants, *i.e.,* MLDC's service of process/personal jurisdiction objections had not been addressed; the decision was thus unfinished, and therefore remained unripe for appellate review. *See* FED. R. CIV. P. 54(b); *Cablevision Systems Development Co. v. Motion Picture Ass'n,* 808 F.2d 133, 136 (D.C. Cir. 1987) (order deciding fewer than all of sev-

eral consolidated cases does not become final judgment for purposes of appellate review absent an "express determination" to that effect by the district judge pursuant to Rule 54(b)).

Plaintiffs did attempt an appeal in June 1987, but Colonial Village blocked that move by successfully asserting, as grounds for dismissal, the final judgment rule. *See Spann v. Colonial Village, Inc.*, Nos. 87-7118 & 87-7119 (D.C. Cir. Apr. 6, 1988) (order dismissing consolidated appeals "without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291"). At that time, the Gerstin defendants stood silently by. They never urged severance of the claims against them. First, they sought no Rule 54(b) certification from the district court when that court issued the May 1987 unfinished decision. Later, they proposed no deconsolidation in this court to salvage the plaintiffs' June 1987 try for an earlier appeal. They have no tenable basis, therefore, for urging their exemption from the current appeal. In short, this appeal, taken within thirty days of the October 1988 disposition, *see* FED. R. APP. P. 4(a), is not too late.

Nor is the appeal premature, as MLDC contends it is. The district court expressly stated that its October 1988 Memorandum and Order resolving remaining issues "makes judgment in these cases final." *Spann*, 124 F.R.D. at 2. However, that court did not publish its final judgment in a separate document in the manner FED. R. CIV. P. 58 instructs: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See also* Appendix of Forms, FEDERAL RULES OF CIVIL PROCEDURE, Form 32 and accompanying Notes of Advisory Committee on Rules (indicating obligation of district court judge and clerk to see to the prompt preparation and entry of judgment in conformity with Rule 58).

The purpose of the "separate document" requirement is explained in the Notes of Advisory Committee on Rules concerning the 1963 Amendment to Rule 58:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted[.]" ... Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running ... for the purpose of appeal....
>
> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); ....

The separate-document requirement, although a salutary main rule, is not a "categorical imperative." *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978) (per curiam). Rule 58, as amended in 1963, clarifies that "a party need not file a notice of appeal until a separate judgment has been filed and entered." *Id.* at 385 (citing *United States v. Indrelunas*, 411 U.S. 216, 220-22 (1973)). The Rule thus shelters the right to appeal. But

> [i]f, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

Id. (footnote omitted).

Rule 58, we agree, "must be applied in such a way as to favor the right to appeal." *Matter of Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir. 1988). Thus,

> "[i]f an appellant files his notice of appeal from a final judgment within the prescribed time after the entry of the judgment as a separate document, his appeal cannot be defeated by the argument that his time to appeal began to run from the entry of some earlier decision, opinion, or order."

Id. at 284 (quoting *Hanson v. Town of Flower Mound*, 679 F.2d 497, 502 (5th Cir. 1982)).[4] Harmoniously, where the separate-document requirement has been overlooked by the district court, so long as "it is clear that the district court has intended a final, appealable judgment, mechanical application of the separate-judgment rule should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment; instead, the right to immediate appeal is favored." *Id.* at 283.

In sum, the district court, in October 1988, took what was plainly meant to be its ultimately dispositive adjudicatory action, constituting its final decision in the case. That decision, we hold, qualifies as "final" for purposes of appellate review pursuant to 28 U.S.C. § 1291 (authorizing review of "final decisions" of district courts). While we are thus satisfied that the appeal is not premature, we emphasize that, to avoid dispute and promote certainty, it is the better practice for the district court to assure as a matter of course the entry of each judgment as a separate document. *See id.* at 284.

Personal Jurisdiction over MLDC

In an April 11, 1989 order, a motions panel of this court ruled that, because MLDC had not filed a cross-appeal, the court could not entertain MLDC's arguments regarding the absence of personal jurisdiction. That ruling, how-

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[4]We recognize that a document labeled "Order" rather than "Judgment" may satisfy Rule 58 sufficiently to start the appeal clock running, if the order is succinctly to the point, and does not have the characteristics of an elaborative opinion. *See* United States v. Perez, 736 F.2d 236, 237-38 (5th Cir. 1984) (cautioning against "mindless" application of Rule 58).

ever, was made without benefit of a full display of the procedural situation in this case; we therefore deem the ruling "without prejudice to reexamination upon full briefing and argument" before the merits panel. *See Association of Investment Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982).

It is true that forum objections, *i.e.*, personal jurisdiction and venue, can be waived at any stage of a proceeding and ordinarily are waived by failure to take a cross-appeal. *See United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 & n.11 (1924). However, "a cross-appeal is not a jurisdictional requirement," and omission of that proper procedural step can be excused when the circumstances so warrant. *See Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986).

We conclude that the requisite exceptional circumstances are present here; accordingly, we will take up MLDC's personal jurisdiction challenge. Just as we declined to apply Rule 58 mechanically to insist on a separate-judgment document as a prerequisite to plaintiffs' appeal, so we decline to preclude MLDC from raising objections it plainly intended to preserve. The uncertainty generated by the absence of a judgment conforming to Rule 58's separate-document requirement both explains and excuses MLDC's failure to cross-appeal. Neither plaintiffs nor MLDC should be trapped by the confusion that existed over the timeliness of plaintiffs' appeal.

MLDC complains that process was not properly served on it. More fundamentally, MLDC denies the existence of the minimum contacts with this forum and lawsuit necessary to justify, under due process, maintenance of the action against it. *But cf. Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (fifth amendment due process, as distinguished from fourteenth amendment, requires sufficient affiliating contacts with the United States, rather than with a particular state). *See also* Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Fed-

eral Rules of Civil Procedure 29-31 (1989) (proposing nationwide service of process in all civil actions arising under federal law).

When this litigation returned to the district court following this court's April 1988 dismissal of the June 1987 appeal for want of a final order, plaintiffs promptly moved for the entry of final judgment. The district court thereupon considered the two matters still open in the consolidated cases: the Gerstin defendants' motion for Rule 11 sanctions against plaintiffs; and MLDC's motion to dismiss on grounds of improper service and lack of the requisite presence in or contacts with the forum. The district court denied the Gerstin defendants' motion for sanctions as baseless, and also denied MLDC's motion. The district court concluded that plaintiffs' several attempts to serve MLDC out-of-state by mail and personal delivery were unavailing; that court held, however, that the proper service made on MLDC's co-defendant and wholly-owned subsidiary, Colonial Village, sufficed to draw in MLDC as well. The district court stated:

> [MLDC] conducts business in this jurisdiction, in many ways, including through Colonial Village, whose employees expressly hold themselves out as agents of [MLDC]. They list the parent corporation on their business cards and advertise [MLDC's] control of the property.

Spann, 124 F.R.D. at 2.

Plaintiffs-appellants, in the instant appeal, did not address MLDC's contentions that it was never served properly and that, in any event, it lacks the requisite affiliation with the District. Instead, plaintiffs-appellants argued only that MLDC's personal jurisdiction objections are precluded, an argument we have rejected. *See supra* pp. 15-16. Examining the record ourselves, however, we find (and MLDC concedes) that an officer of Colonial did indeed display a business card identifying Colonial Village, Inc. as "a Mobil company." But that is all we find. If there is more to connect MLDC to this case and forum,

e.g., advertisements for Colonial Village mentioning Colonial's affiliation with MLDC, it has not been pointed out to us.

Because we are unable to review intelligently the personal jurisdiction questions (MLDC's affiliation with the District, and the propriety of serving Colonial on MLDC's behalf) on the basis of the thin materials at hand, we return the matter of the amenability of MLDC to suit here for further airing. Noting that the liaison between MLDC and Colonial Village bears not only on the nexus required for personal jurisdiction and the sufficiency of service of process, but on the merits of the complaint against MLDC as well, we leave it to the district court to decide whether discovery concerning the character of Colonial's advertising and affiliations with MLDC should precede a definitive ruling on personal jurisdiction over MLDC.[5]

Fair Housing Act Claims

The district court dismissed plaintiffs' FHA claims as time-barred; we reverse that ruling because it erred in its method of determining whether a violative act occurred within the prescribed period.

Currently, the Fair Housing Act has a standard, two-year statute of limitations:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

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[5]When plaintiffs moved in May 1988 for an order entering final judgment, they asked the district court 1) to deny MLDC's motion to quash service as moot, if that was the court's original intention, or 2) to deny the motion on its merits, or 3) "if the court determines that [MLDC's] motion to quash service ... may not be denied on the present state of the record, then ...[to] permit[ ] discovery as to the issues raised by the motion but grant[ ] a certificate under Rule 54(b) permitting the appeal to proceed ... as to all other parties."

> practice ... to obtain appropriate relief with respect to such discriminatory housing practice ....

42 U.S.C. § 3613(a)(1)(A) (1989). At the time these actions commenced, however, Congress prescribed: "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory practice occurred." 42 U.S.C. § 3612(a) (1982). Where one discrete act of discrimination was at issue, the prescription was unproblematic: that act had to fall within 180 days of the filing of the court complaint. "Continuing violations," on the other hand, were less readily fitted to the statute's terms. Eventually, the Supreme Court confirmed lower court opinion that

> where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitation period, the complaint is timely when it is filed within 180 days of *the last asserted occurrence* of that practice.

Havens, 455 U.S. at 380-81 (emphasis added); *see also McKenzie v. Sawyer*, 684 F.2d 62, 72 & n.8 (D.C. Cir. 1982) (explaining, in the context of Title VII of the Civil Rights Act of 1964, the timeliness of charges of discrimination antedating but persisting into the limitations period, and distinguishing from the time in which to file charges, the time period for which recovery is available).[6]

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[6]We recognize that the alleged violations in *Havens* were different from those pressed here. In *Havens*, any one of the acts allegedly committed by the defendant (lying to a tester about the availability of housing) would constitute a violation of § 804(a) of the FHA. Here, by contrast, it is highly unlikely that a single ad containing only white models could alone violate § 804(c). However, in *McKenzie*, *supra*, we upheld a grant of summary judgment in favor of plaintiffs on their Title VII claim even though no single act of the defendant would likely have violated Title VII. We recognized there that plaintiffs' Title VII claim "rested largely on sheer numbers," 684 F.2d at 68, and looked to defendant's conduct before the actionable period to show the violative character of defendant's conduct in that period. In failing to make an inquiry of the latter kind, the district court erred.

The district court identified as the relevant time frames in this litigation April 1986 to October 1986 for the complaint against Colonial, and May 1986 to November 1986 for the complaint against the Gerstin defendants. That court arrived at each of these two periods by counting back 180 days from the complaint filing. *See Spann*, 662 F.2d at 546. If these frames were the correct ones, the summary judgment for the defendants would have been secure, for in those months, apparently spurred by plaintiffs' administrative complaints,[7] over twenty-eight percent of Colonial's ads published in *The Washington Post* and over forty percent of the Gerstin ads published in *The Post* featured black models. *See id.* at 543.[8]

But plaintiffs' complaints are not centered on those periods. Instead, plaintiffs complain of periods in which both Colonial and the Gerstin defendants featured *exclusively* white models. In the case against Colonial, that period runs from January 1985 to April 1986, and in the case against the Gerstin defendants, the relevant time frame is January 1985 to May 1986. In each case, the last of the long stream of all white ads, plaintiffs allege, occurred within the 180-day zone, *i.e.*, in April or May 1986; thus, under the "continuing violation"/"last asserted occurrence" theory that the Supreme Court has advanced, *see supra* p. 19, the plaintiffs claims are not time-barred.[9]

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[7]Several months before instituting court actions, plaintiffs filed administrative complaints with the District of Columbia Office of Human Rights and the United States Department of Housing and Urban Development.

[8]In another case brought by the same plaintiffs, the district court said it had held in this case only "that if in real estate advertisements some photographs feature white models, some black models, and some of both, no violation of the [Fair Housing] Act occurs merely because the races are not represented proportionately to population, or because black models are not included in every display, unless an intention to discriminate is shown by extrinsic evidence." Spann v. The Carley Capital Group, Nos. 87-1154 & 87-1155, slip op. at 7 (D.D.C. Dec. 12, 1988).

[9]The district court appeared to recognize in its second encounter with this case that its initial time-bar decision bore reexamina-

Section 1981 and 1982 Claims

The provisions of 42 U.S.C. §§ 1981, 1982, the Supreme Court has restated, have a limited province and do not qualify as all-purpose antidiscrimination or comprehensive open housing laws; in particular, the High Court has said that section 1982 "does not prohibit [real estate] advertising or other [dwelling place sale or rental] representations that indicate discriminatory preferences." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968); *see also Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372 (1989) (construing § 1981 in light of § 1982). The district court properly dismissed the claims plaintiffs attempted to state under the headings of these post-Civil War civil rights measures, *see Spann*, 662 F.Supp. at 547, and we have no cause to add to that court's statement.

Conclusion

For the reasons stated, we reverse the district court's ruling that plaintiffs' Fair Housing Act claims are time-barred and we return the case for further proceedings consistent with this opinion.

It is so ordered.

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tion. Dismissing the Gerstin defendants' motion for sanctions, the district court said:

> [D]efendants contend that their advertising during the 180 days prior to the filing of the complaint does not indicate a racial preference, and that the complaint is therefore without basis in fact. In fact, however, the complaint of racial preference in defendants' ads is not limited to that time period. Only the last asserted occurrence of a practice of racial preference need be in that 180 day period. In its Opinion of May 22, 1987, the Court found that the last of defendants' all-white ads was published within the 180-day limitations period beginning on May 24, 1986.

Spann, 124 F.R.D. at 3.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7118

September Term, 1987

CA 86-02917

CA 86-03196

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

And Consolidated Case

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 6 1988

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Robinson, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of appellants' Motion for Leave to Seek Correction of the District Court's Order under Fed. R. Civ. P. 60(a) and appellees' Cross-Motion for Dismissal of Appeal under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291 (1982), it is

ORDERED by the court that appellants' Motion for Leave be denied. It is

FURTHER ORDERED that appellees' Motion for Dimissal of Appeal be granted. The appeals are hereby dismissed without prejudice for lack of a final order under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291 (1982).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

September Term, 1988

C.A. No. 86-2917

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

And consolidated case

United States Court of Appeals
For the District of Columbia Circuit

FILED APR 11 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Robinson and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Mobil Land Development Corporation for dismissal of appeal, the motion to dismiss of appellees Gerstin, the opposition thereto and the replies, it is

ORDERED that the motions to dismiss be denied. Because Mobil has not filed a cross-appeal, this court cannot consider Mobil's arguments regarding personal jurisdiction.

See Freeman v. B & B Associates, 790 F.2d 145, 150-51 (D.C. Cir. 1986) (appellee cannot attempt to overturn or modify a district court's judgment, with a view to enlarging his own rights thereunder or lessening the rights of his adversary, unless he takes a cross-appeal) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). As to the finality claim, this court previously determined, in an order filed April 6, 1988, that the district court's May 22 decision was not final and therefore could not be appealed. *See* Fed. R. Civ. P. 54(b). Rather, as we now confirm, the district court's October 13 decision constitutes the final decision in this matter. Therefore, the second appeals, taken from the district court's October 13 decision, are timely and cannot be dismissed on that ground. Moreover, the district court's May 22 decision extends to Mobil as well as to Colonial Village and Gerstin, and there is no ongoing proceeding in the district court in regard to Mobil.

Per Curiam

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257
September Term, 1988
CA 86-2917

Girardeau A. Spann, et al.,
Appellants

v.

Colonial Village, Inc., et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 19 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Robinson and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Gerstin appellees and of Mobil Land Development Corporation it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7257

September Term, 1989

CA 86-2917
86-3196

Girardeau A. Spann, et al.,

Appellants

v.

Colonial Village, Inc., et al.

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and Consolidated Case No. 88-7260

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 03 1990

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Ruth B. Ginsburg and Williams, Circuit Judges

ORDER

Upon consideration of the Petitions for Rehearing of Marvin Gerstin and Marvin Gerstin Associates, Inc., Mobil Land Development Corporation and Colonial Village, Inc., it is

ORDERED, by the Court, that the aforesaid Petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

MARVIN J. GERSTIN, et al.,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

HOWARD BOMSTEIN, et al.,

Defendants.

FILED

MAY 22 1987

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

OPINION

In these consolidated cases,[1] plaintiffs Girardeau A. Spann, the Fair Housing Council of Greater Washington ("FHC), and the Metropolitan Washington Planning and Housing Association ("MWPHA") have brought suit, seeking a declaratory judgment, permanent injunctive relief and damages, against Colonial Village, Inc. ("Colonial"), Marvin Gerstin Associates, Inc., an advertising agency and Marvin Gerstin (collectively referred to as "Gerstin"), alleging that the advertisement campaigns of these defendants in *The Washington Post* featuring exclusively white models indicate a racial preference in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c) and sections 1981 and 1982 of the 1966 Civil Rights Act, 42 U.S.C. §§ 1981, 1982.

Colonial and Gerstin have moved to dismiss or, in the alternative for summary judgment, on the grounds, *inter alia*,[2] that plaintiffs have failed to state a claim under

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[1] Originally, three cases were involved in this consolidated action. By a stipulation of dismissal filed on March 30, 1987, plaintiffs' suit against Howard Bomstein and related defendants, *Spann* v. *Bomstein*, C.A. No. 86-3268, was dismissed with prejudice.

[2] Both defendants assert additional grounds in their respective motions. Colonial contends that the plaintiff associations, the FHC and the MWPHA, do not have valid claims for monetary damages. On the basis of a somewhat similar argument, Gerstin's motion argues that plaintiffs' claims are barred by the First Amendment to the Constitution. According to the longstanding principle that courts should decline to resolve constitutional issues if such resolution can be avoided by adjudication of a statutory issue or issues, *see Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594 (1982); *Siler* v. *Louisville & Nashville*

either section 1981 or 1982, and that plaintiffs' claim under the Fair Housing Act ("FHA") is barred by the limitations period set forth in that statute. *See* 42 U.S.C. § 3612(a). Gerstin's motion to dismiss is based on the additional ground that plaintiffs have failed to state a claim upon which relief may be granted under the FHA.[3]

To facilitate an orderly and logical disposition of the issues raised in the motions of the two defendants, and in light of the substantial similarity of the issues raised in the motions, this Opinion will address those issues in the following manner. After briefly discussing the factual background, the Court will consider the various motions

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Railroad Co., 213 U.S. 175, 193 (1909), the Court finds it unnecessary to address Gerstin's First Amendment argument as this case can be disposed of on statutory grounds. The standing arguments mentioned above, as well as a Colonial motion to strike, seal, or expunge the complaint likewise do not need to be discussed since the other grounds in the motions completely dispose of plaintiffs' claims.

[3] Plaintiffs also allege that, by using ads exclusively featuring white models over a significant period of time, Gerstin has breached a Conciliation Agreement, which was signed by Gerstin and the MWPHA among others. Gerstin also moves to dismiss plaintiffs' claim on the ground that it is barred by the statute of limitations. *See* D.C. Code § 12-301(7). Since the Court concludes that defendants' motions to dismiss are meritorious, *see infra*, and therefore will grant these motions, the contractual claim is properly before this Court only if the Court exercises its discretion to retain pendent jurisdiction over that claim. *See United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966).

The Supreme Court has stated that if federal claims supporting the basis for jurisdiction are dismissed before trial, even though those claims are not insubstantial in a jurisdictional sense, the state claims should be dismissed. *Id.* Some lower federal courts, however, have departed from this dictum and hold that dismissal of the state law claim in such situations is discretionary, based upon considerations of judicial economy, convenience and fairness. *See, e.g., Financial General Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 773-74 (D.C. Cir. 1982). In this case, consideration of those factors indicates that dismissal of the contractual claim would be proper since extensive pretrial proceedings have not yet occurred. Consequently, the Court will decline to retain jurisdiction over the contractual claim and will dismiss it without prejudice.

regarding the claim under the FHA, including the statute of limitations arguments. This will be followed by a brief discussion of defendants' motions to dismiss the section 1981 and 1982 claims.

I

From January 1985 to April 24, 1986, Colonial caused to be published advertisements in *The Washington Post* for the sale of housing units in the Colonial Village complex in Arlington, Virginia. These advertisements featured exclusively white models. Contending that these all-white model advertisements conveyed a racial preference for white purchasers, plaintiffs filed administrative complaints with the District of Columbia Office of Human Rights ("OHR") and the United States Department of Housing and Urban Development ("HUD") on April 24, 1986. To date, one year later, these complaints remain unresolved. However, apparently as a consequence of the pendency of the administrative complaints, Colonial adopted a written policy that, according to it, reflects its commitment to equal housing opportunity, in that it specifically requires nondiscriminatory selection of models for Colonial's ads. Colonial claims that it notified its advertising agency of this policy and instructed it to ensure that an adequate number of black models were featured in Colonial's ads.

During the ten-month period from April 24, 1986 to February 24, 1987, at least thirty-six percent of Colonial's ads published in *The Post* have featured black models. During the 180 days immediately preceding the filing of the complaint herein, 28.6 percent of all of Colonial's ads in *The Post* featured a black model. None of Colonial's ads, at any time, has contained language indicating or suggesting a racial preference. To the contrary; all of its ads in *The Post* have included the phrase "Equal Housing Opportunity" as well as a related logo.

As far as Gerstin is concerned, it placed advertisements depicting only white models from January 1, 1985 to May

30, 1986 for *inter alia*, the Crystal, Espirit, Horizons, and Tivoli Woods properties in Arlington, Virginia. Plaintiffs filed administrative complaints with the OHR and HUD challenging these advertising practices as well. As with the administrative complaints filed against Colonial, the complaints against Gerstin remain unresolved. During the 180-day period immediately preceding the filing of the complaint in this action, thirty percent of the published, display ads made by Gerstin featured black models, and forty percent of the Gerstin display ads published in *The Post* during that period featured one or more black models.

II

Plaintiffs assert that the advertising practices involved here violate section 3604(c) of the Fair Housing Act, 42 U.S.C. § 3604(c).[4] Section 3604(c) prohibits the "mak[ing], print[ing], or publish[ing] or caus[ing] to be made, printed, or published" any advertisement for the purchase or lease of a dwelling that indicates any discriminatory preference or an intention to make any such preference. Plaintiffs contend that defendants have violated section 3604(c) by making or causing to be made real estate ads featuring only white models over a period of approximately eighteen months. Supporting this claim, plaintiffs cite several court decisions as well as certain regulations promulgated by HUD construing section 3604(c). These contentions are not well taken.

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[4] The complaint also alleges that Colonial and Gerstin violated section 3604(a) of the FHA, 42 U.S.C. § 3604(a). However, plaintiffs have not alleged that defendants have refused to sell or rent housing, refused to negotiate for such sale or rental, or have otherwise denied any housing on the basis of race. Gerstin's motion to dismiss for failure to state a claim under section 3604(a), will therefore be granted. Further, since plaintiffs cannot prevail substantively under section 3604(a), Colonial could not have violated that section within the 180-day period immediately preceding the filing of the complaint, and Colonial's motion to dismiss this claim pursuant to section 3612(a) will also be granted.

First. Each of the cases in which a court found a violation of section 3604(c) involved far different and far more direct and affirmative indications of racial preference than are present here. For example, in *United States* v. *Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), the Fourth Circuit not surprisingly held that a rental ad specifying that the apartment was in a "white home" violated section 3604(c). Similarly, an oral statement to a white tenant by her landlord requesting that the tenant send her friends over to see an apartment available for rent in the building, but to "make sure her friends are whites," was held to violate the FHA. *United States* v. *Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972). And in *Saunders* v. *General Services Corporation*, C.A. No. 86-0229-R (E.D. Va. May 12, 1987), Judge Merhige recently found a violation of section 3604(c) where, in addition to the failure to use black models, there was substantial evidence that personnel of the corporation managing the apartment complexes in question repeatedly were instructed to treat black tenants and prospective tenants less favorably than whites; that the corporation committed a fraud when it agreed to use but did not, in fact, use an equal housing opportunity slogan or logo; and that it virtually failed to use black models in a brochure with sixty-eight photographs of which 134,000 copies were printed. *See also Holmgren* v. *Little Village Community Reporter*, 342 F. Supp. 512 (D.C. Ill. 1971) (ad indicating a preference for purchaser or tenant who spoke a particular language held to violate section 3604(c)).

All of these precedents are a far cry from advertisements in a daily newspaper during the period covered by the law (*see* Part IV *infra*) (1) some of which depicted only white models, some only black models, and some a mixture of both; (2) in which the number of black models used hovered between approximately thirty and forty percent; and (3) all of which included an equal housing opportunity slogan and logo.

These precedents would help plaintiffs only if they could somehow be construed to require proportional representation of the models of each race in all advertising, but no case has so held.[5]

Second. HUD's regulations pursuant to section 3604(c) of the FHA, do provide that "[i]f models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area and both sexes." 24 C.F.R. § 109.30(b). However, not only is that provision substantively vague, but it, and other related regulations, state only that certain practices may "indicate" a violation of the FHA or may be "evidence of compliance" with the FHA. 24 C.F.R. §§ 109.25, 109.30.

More fundamentally, these regulations were promulgated pursuant to the authority given to HUD to investigate complaints alleging discriminatory housing practices and to refer cases to the Attorney General to initiate suit, 42 U.S.C. §§ 3608, 3610; they give notice to advertisers and advertising media; and they describe when HUD will exercise this authority to investigate or to refer. 24 C.F.R. § 109.10[6] The regulations not only do not purport to, and they do not, apply to litigation in court, but they fail

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[5] Indeed, Judge Merhige explicitly held in *Saunders*, *supra*, that defendants were not required to include blacks in their advertising proportionate to their percentage in the Richmond metropolitan area.

[6] 24 C.F.R. § 109.10 reads as follows:

> The purpose of these regulations is to assist all advertising media, advertising agencies and all other persons who use advertising to make, print, or publish or cause to be made, printed, or published any advertisement with respect to the sale, rental, or financing of a dwelling, in compliance with the requirements of Title VIII. These regulations also describe the matters this Department will review in evaluating compliance with Title VIII in connection with investigations of complaints alleging discriminatory housing practices involving advertising.

entirely to provide authority regarding the parameters of section 3604(c) when that provision is involved in the context of such litigation.

III

Beyond all of these more or less technical difficulties which plaintiffs have failed to overcome, there is the problem of the practical ramifications of their claims were these to be sustained. That problem suggests that, before the Court could ascribe to the Congress an intention to prohibit, *without more*, advertisements or advertising campaigns featuring models predominantly of one race or one sex, that intention would have to be far more clearly expressed.

First. It could be contended in implementation of plaintiffs' theory, that section 3604(c) requires that, if an indication of a discriminatory preference is to be avoided, a black model must be included in each display, real estate advertisement. Such an interpretation of section 3604(c) would be irrational, for nondiscriminatory as well as discriminatory advertisements would then be within the purview of the statute, inasmuch as publication of a single ad with only white models does not *per se* indicate a discriminatory preference.[7]

In addition to being an overbroad application of section 3604(c), such an interpretation could render impractical advertising with human models, for it would mean that every advertisement made or published would have to include at least one model representative of each minority in the relevant community. Consequently, a housing ad with a broad target market might have to include numerous models, and advertisements featuring only one or

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[7] For example, if such an ad were preceded or succeeded by many ads with a substantial number of black models or only black models, there would plainly be no discrimination.

two models could on that basis alone be regarded as violating section 3604(c). The obvious consequence would be that housing advertisements with human models would become virtually nonexistent.

Second. A narrower interpretation is not more convincing. It may be that plaintiffs are arguing that section 3604(c) requires a proportional representation of blacks in ads, based on the targeted market, for a particular housing project over a period of time.

According to this view of section 3604(c), in order to comply with the FHA, real estate advertisers would be required to make factual determinations regarding the boundaries of their target market in advance of publishing an ad; they would have to determine both how many types of minorities reside in the target market and the proportion of each type of minority to that market; and the precise duration of the advertising campaign for a particular market. Only then would the advertiser be in a position to decide how many models of each minority would have to be placed in each ad or in the several ads over the duration of the advertising campaign in order to meet the goal of proportionality and thus to avoid the indication of a discriminatory preference.

In light of the numerous variables in the real estate market, many of which cannot be predicted in advance, it is the opinion of the Court that the law could not have been intended to require advertisers to make such determinations. Without exact figures and predictions, advertisers could not conceivably determine whether they would, in fact, be in compliance with section 3604(c).

In addition to these immediate practical implications, there is also the broader problem of the chilling effect of such burdens on advertisers' ability and desire to advertise, implicating First Amendment concerns. *See generally Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980); *Virginia State Board of*

Pharmacy v. *Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

For these reasons, the Court would not be justified in construing section 3604 as establishing a flat rule requiring the use in ads of models of a particular race or sex in particular proportions. When the Congress prohibited advertisements that indicate a discriminatory preference, it could only have intended that the preference be either obvious from the ad itself (as in the *Hunter* case, *supra*) or that such preference be ascertainable through extrinsic circumstances (as in *Saunders, supra*). Usually the proof of such extrinsic circumstances will implicate an element of discriminatory intent. Where such intent is demonstrated, a case would be made out under the Fair Housing Act regardless of the proportion of white to black models in one ad or a series of ads. The Court holds, therefore, that absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads.

It should be well understood, however, that this does not mean that discriminatory intent would necessarily have to be proved by direct evidence. Such intent could be inferred, for example, by evidence of prior or concurrent discriminatory advertising practices of the defendant, in particular if a challenge to such practices had previously been brought to his attention. A determination regarding the statutory violation would of course have to be made on the facts of the particular case.

IV

It is unnecessary to determine here whether defendants had the intent to indicate discriminatory preferences through their ads or ad campaigns over the entire period at issue, since the record clearly shows that, under any

test, neither defendant possessed the requisite intent during the limitations period set forth in the FHA, *see* 42 U.S.C. § 3612(a), and that, indeed, neither defendant's ads or ad campaigns indicated a racially discriminatory preference during that period under any standard.

In order to bring a civil action under the Fair Housing Act, a plaintiff must file his complaint in court within 180 days after the alleged discriminatory housing practice—here discriminatory advertising—occurred. 42 U.S.C. § 3612(a). With respect to Colonial, the relevant period of inquiry therefore is from April 26, 1986 to October 23, 1986, the latter marking the date plaintiffs filed their complaint against Colonial. During that period, over twenty-eight percent of Colonial's ads published in *The Post* featured black models. The population of the Washington metropolitan area is approximately twenty-seven percent black. Clearly, then, Colonial's advertising campaign for that period cannot be said to indicate a discriminatory preference or an intention to make such a preference. This conclusion is strengthened by the fact that in April 1986 Colonial adopted a written policy that appears to reflect Colonial's commitment to equal housing opportunity and that specifically requires nondiscriminatory selection of models for its advertisements.

The relevant period of inquiry with respect to Gerstin is from May 24, 1986 to November 20, 1986. Forty percent of Gerstin's ads published in *The Post* during that time period featured one or more black models. As with Colonial, Gerstin's ads during that relevant period did not indicate a discriminatory preference or an intent to make such a preference. In brief, there was no conceivable violation by either defendant during any period not barred by the statute of limitations. For the reasons stated, the Court will grant the motions to dismiss the FHA claims of both defendants.

V

Both defendants have also moved to dismiss the section 1981 and 1982 claims for failure to state claims upon which relief can be granted. That issue may be disposed of more briefly.

Section 1981 provides that all persons shall have the right to enjoy the "full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," 42 U.S.C. § 1981, and section 1982 provides that all citizens shall have equal rights to purchase, sell, hold and convey real and personal property, regardless of color or race. Plaintiffs claim that defendants' advertising practices violate these provisions in that they deter blacks from applying to lease or purchase property in the advertised developments and that they thereby effectively at the very outset interfere with the opportunity of blacks to purchase or lease property.

Not only does the language of sections 1981 and 1982 fail to refer to advertising in conjunction with real property, an examination of the precedents clearly indicates that no claim has been stated under either section 1981 or section 1982.

Plaintiffs have cited no decided case, and the Court has found none, suggesting that either section 1981 or section 1982 provides a cause of action for advertising that may indicate a racially discriminatory preference. To the contrary; the Supreme Court has explicitly stated that "[section 1982] does not prohibit advertising or other representations that indicate discriminatory preferences." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).[8] *See also Saunders, supra.*[9]

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[8] Since, as plaintiffs correctly note, the scope of section 1981 parallels the scope of section 1982, *see Runyon* v. *McCrary*, 427 U.S. 160, 170-

Plaintiffs argue that, notwithstanding the Supreme Court's statement in *Jones*, they are entitled to prevail because an all-white advertising constitutes "steering," the practice of directing prospective black tenants and purchasers away from "white" housing developments. *See McDonald* v. *Verble*, 622 F.2d 1227 (6th Cir. 1980). However, again, not a single case is cited holding or intimating that an advertising practice constitutes "steering." Steering has generally been found to exist only where there has been rejection or denial of the opportunity to purchase or rent housing to a minority applicant. *See, e.g., Marable* v. *M. Walker & Associates*, 644 F.2d 390 (5th Cir. 1981); *Johnson* v. *Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973). Plaintiffs here have not claimed, nor could they claim, that they have been denied the opportunity to purchase or rent a housing unit by the defendants. For the reasons stated, the section 1981 and 1982 claims must also be dismissed.

An order consistent with the above is being issued herewith.

May 22, 1987

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

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71 (1976), the Supreme Court's statement in *Jones* pertaining to section 1982 applies with equal force to section 1981.

[9] Moreover, there is nothing in the legislative history of sections 1981 and 1982 to indicate that those statutes were intended to prohibit discriminatory advertising. In fact, as discussed above, Congress felt it necessary, subsequent to the enactment of sections 1981 and 1982, to enact the Fair Housing Act with the objective, *inter alia*, of prohibiting advertising indicating or intended to make a discriminatory preference. 42 U.S.C. § 3604(c).

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

MARVIN J. GERSTIN, et al.,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, et al.,

Plaintiffs,

v.

HOWARD BOMSTEIN, et al.,

Defendants.

FILED

MAY 22 1987

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER

In accordance with the Opinion issued contemporaneously herewith, it is this 22nd day of May, 1987

ORDERED that defendant Colonial and defendant Gerstin's motions for summary judgment with respect to plaintiffs' claims under the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), be and they are hereby granted; and it s further

ORDERED that defendant Colonial's and defendant Gerstin's motions to dismiss plaintiffs' claims pursuant to 42 U.S.C. §§ 1981 and 1982 be and they are hereby granted; and it is further

ORDERED that plaintiffs' breach of contract claim be and it is hereby dismissed without prejudice for lack of subject matter jurisdiction; and it is further

ORDERED that, as a result of the granting of defendant Colonial's and defendant Gerstin's motions to dismiss or, in the alternative, for summary judgment, the following motions be and they are hereby denied as moot:

(1) Gerstin's Motion to Strike Declarations;

(2) Plaintiffs' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment;

(3) Gerstin's Motion to Strike, Seal or Expunge and In Limine;

(4) Plaintiffs' Motion for Disqualification of Counsel; and

(5) Colonial's Motion to Strike the "Related Case" Designations by Plaintiffs;

and it is further

ORDERED that these consolidated cases be and they are hereby dismissed.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 86-2917

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

COLONIAL VILLAGE, INC.,

Defendant.

Civil Action No. 86-3196

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

MARVIN J. GERSTIN, *et al.*,

Defendants.

Civil Action No. 86-3268

GIRARDEAU A. SPANN, *et al.*,

Plaintiffs,

v.

HOWARD BOMSTEIN, *et al.*,

Defendants.

FILED

OCT 13 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

On May 22, 1987 this Court dismissed two of the above-captioned consolidated cases.[1] Plaintiffs Girardeau A. Spann, et al., appealed and on July 1, 1988, the Court of Appeals dismissed the appeal on the ground that a final order from this Court was wanting. In this Memorandum, the Court addresses two remaining motions, the resolution of which makes judgment in these cases final. The Court will consider in turn defendant Mobile Land Development Corporation's (Mobil) motion to dismiss or quash service of process and the motion by defendants Marvin J. Gerstin, et al., for Rule 11 sanctions against plaintiffs. Fed. R. Civ. P. 11.

I

Plaintiffs attempted proper service on Mobil in several ways, the one of which proved satisfactory. On three occasions plaintiffs tried to serve Mobil by mail, once by personal service in New York, and once by serving Mobil's wholly owned subsidiary Colonial Village, Inc. The last method effected service on Mobil.

It seems that plaintiffs first tried to serve Mobil with a summons and complaint at an address in Virginia, a mailing that defendant did not acknowledge. Likewise, Mobil did not sign and return the acknowledgement and receipt forms for the second and third mailings, which went to a New York address and which were sent on December 19, 1986, and January 20, 1987.

[1] The third case was dismissed by stipulation of the parties.

Plaintiffs' contention that the third mailing, the second to the same address in New York, simultaneously satisfied the D.C. long-arm service procedures is not well taken. Rule 4(c)(2)(C)(i), permitting service in accordance with state law, is available as an alternative to Rule 4(c)(2)(C)(ii) only in the first instance; they may not be used sequentially. *Id.* at 444-448.

On February 19, 1987, plaintiffs made a fourth attempt to serve Mobil directly, this time by personal service, but service was not made within the territorial limits of the District of Columbia, *see* Fed. R. Civ. P. 4(f), and there is no federal statute or rule generally authorizing extra-territorial service in actions under the 1866 Civil Rights Act or the Fair Housing Act. *See Omni Capital International, et al.* v. *Rudolf Wolff & Co., Ltd, et al.*, 98 L.Ed.2d 415, 425 (1987).

Mobil concedes, however, that service was effective on Colonial Village, Inc., its wholly-owned subsidiary. Plaintiffs contend that since Colonial Village holds itself out to the public as "a Mobil company," that service on it effected service on Mobil. They are correct. Certainly one corporation or business organization can be "the agent of another corporation so that service on an . . . agent of one organization can be valid service on another." 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 110 at 123 (1987); *see also Heiss* v. *Olympus Optical Co.*, 111 F.R.D. 1, 6 (N.D. Ind. 1986) (citing cases). Mobil conducts business in this jurisdiction, in many ways, including through Colonial Village, whose employees expressly hold themselves out as agents of Mobil. They list the parent corporation on their business cards and advertise Mobil's control of the property. *See, e.g., Price* v. *Griffin*, 359 A.2d 582, 586 (D.C. App. 1976); *see also Dunn Appraisal* v. *Honeywell Information Systems*, 687 F.2d 877, 881 (6th Cir. 1982).

In this vein, "notice seems to be the keystone to proper service." 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1101 at 105. It is quite obvious that the parent company Mobil had actual notice of this action, as it concedes at this point. Consequently, service was properly effected on Mobil.

II

On July 13, 1987, over one month after defendants Gerstin, et al., filed their appeal in this action, they moved for Rule 11 sanctions against plaintiffs premised on a number of claims which struggle to find fault with plaintiff's legal representations. Some of the requests for sanctions are preposterous, such as the assertion that plaintiffs' intended to frustrate the litigation they instigated, or to lay a foundation for a future request for an extension of time, by allowing an attorney to file a complaint who anticipated withdrawing from the case. Equally absurd is the claim that the Court should impose sanctions on plaintiffs for "delaying" this action because they requested that the action be consolidated with like actions and then moved to disqualify counsel in one of the other cases. There is nothing unusual or improper about this.

Other charges by defendants as grounds for Rule 11 sanctions are similarly without merit. The assertions made by plaintiffs in their complaint and contested by defendants do not lack a reasonably defensible basis in fact or law. For example, defendants contend that their advertising during the 180 days prior to the filing of the complaint does not indicate a racial preference, and that the complaint is therefore without basis in fact. In fact, however, the complaint of racial preference in defendants' ads is not limited to that time period. Only the last asserted occurrence of a practice of racial preference need be in that 180 day period. In its Opinion of May 22, 1987, the Court found that the last of defendants' all-white ads was

published within the 180 day limitation period beginning on May 24, 1986.

Defendants also contend that plaintiffs deliberately overread regulations of the Department of Housing and Urban Development in order to cause the Court to believe that they required advertising models to represent majority and minority groups in the metropolitan area, when the regulations are merely safe harbors. Defendants do not cite any case law that these regulations are not intended to have the force of law or to govern in this litigation. The regulations are of course entitled to substantial deference by the Court when interpreting that Fair Housing Act, *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 107 (1979), and plaintiffs can, at a minimum, argue as much. In short, the requests for sanctions are frivolous, and to grant them would be to chill respectable though novel advocacy.

Consequently, it is this 13th day of October, 1988

ORDERED that defendant Mobil's motion to dismiss or quash service of process be and it is hereby denied; and it is further

ORDERED that the motion of the Gerstin defendants for sanctions be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX I

[EXCERPTS FROM DISTRICT COURT RECORD]

AFFIDAVIT OF DALE R McGINLEY

* * *

3. From January 1 through April 24, 1986, three prototype advertisements for the Colonial Village project were published in the Washington *Post* and these appeared a total of nine times. Copies of these ads are attached as Exhibits B, C and D. During 1985, three similar prototype ads for Colonial Village were published in the Washington Post and appeared a total of 22 times.

4. From April 24, 1986, until October 23, 1986, four prototype advertisements for Colonial Village were published in the Washington Post a total of fourteen times. These included ads with text and photos similar to Exhibits B, C and D and also included the prototype attached as Exhibit E. 28.6% of all the ads appearing in the Post for Colonial Village during the 180 days prior to October 23, 1986 featured a black model.

5. From April 24, 1986 through today, a total of twenty-two ads for Colonial Village have been published in The Washington Post. Of these, 36.4% have featured black models.

6. Before the OHR and HUD complaints were filed, the management of Colonial Village was not aware of any racial imbalance in the models shown in our ads. None of the plaintiffs ever contacted us and we received no complaints about the ads prior to that time. The matter of a racial preference in advertising had never been discussed at all in our company.

7. None of the ads for Colonial Village have contained any statement indicating or suggesting a racial preference.

8. To the best of my knowledge and belief, every advertisement published for Colonial Village in the Washington Post since at least January 1985 to date has included the words "EQUAL HOUSING OPPORTUNITY" and an "EHO" logo suggested by HUD as a symbol to indicate nondiscrimination in housing.

9. Colonial Village has never given any instruction or made any suggestion to our advertising agency that a racial preference should be indicated in advertisements for the project or that models for the ads should be selected on a discriminatory basis. While we have reviewed and approved the advertising themes and concepts proposed by our agency, as well as the specific prototypes to be used from time to time, Colonial Village has had no role at all in the actual selections of models. Moreover, it would be absolutely contrary to our company policies and purposes either to utilize or to request discriminatory or racially preferential ads.

* * *

13. The management of Colonial Village, Inc. has never had any dealings with any of the plaintiffs other than in connection with their various complaints starting on April 24, 1986. In fact, it is fair to say that we had never heard of any of them. Certainly none of our activities or conduct were ever directed toward nor intended in any way to injure the plaintiffs personally or in their organizational capacity.

14. Apparently the plaintiffs were monitoring our ads continuously since January, 1985. If they had expressed their concerns to us at any time that the models in our photographs did not reflect a proper racial balance, the problem could and would have been resolved by our company. There would have been no need for any complaints to OHR or HUD, nor any litigation in the federal courts, and the plaintiffs could have spared themselves the outrage

and upset about which they complain. In fact, as soon as this issue was drawn to our attention, the Colonial Village management did promptly act to end any conceivable basis for complaint.

[SIGNATURE AND NOTARIZATION OMITTED IN PRINTING]

* * *

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

In support of its motion for summary judgment, defendant Colonial Village, Inc. submits that no genuine dispute exists as to the following facts:

* * *

8. Months before the complaint was filed in this case, defendant had established a written policy to insure non-discriminatory selection of models for its advertisements and had notified its advertising agency of such policy. . . .

9. The defendant's management was unaware of any racial imbalance in the models pictured in its advertisements before the OHR and HUD complaints were filed by plaintiffs in April, 1986. . . .

10. Defendant does not select the models for its advertising. It has never given any instruction or suggestion to its advertising agency that a racial preference should be indicated in the advertisements for Colonial Village or that models should be selected for the ads based on their race. . . .

* * *

RESPONSE OF PLAINTIFFS TO COLONIAL VILLAGE'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Local Rule 108(b), plaintiffs respond to Colonial Village's Statement Of Material Fact As To Which There Is No Genuine Issue as follows:

* * *

7. the factual assertions in paragraphs 8-10 of Colonial Village's Statement of Material Facts are not material to the issue of liability in this case. To establish Colonial Village's liability under the Fair Housing Act plaintiffs need not show either the discriminatory intent or direct supervision of Colonial Village in causing to be made and published all-white human model ad campaigns. * * *

AFFIDAVIT OF DENNIS H. BLOOMQUIST

* * *

2. MLDC [Mobil Land Development Corporation] is a Delaware corporation, duly organized and registered with its principal place of business in New York, N.Y. MLDC does not maintain an office or other facilities in the District of Columbia nor is MLDC registered as a foreign corporation in the District of Columbia. MLDC does not have a registered agent in the District of Columbia. MLDC has no officers, agents or employees working or residing in the District of Columbia. MLDC is not listed in the District of Columbia telephone directory.

3. MLDC has not in the past engaged and does not now engage in any sales of services or products in the District of Columbia and does not regularly do or solicit business in the District of Columbia.

4. MLDC does not pay District of Columbia taxes.

5. MLDC does not derive any revenue from services rendered or products sold in the District of Columbia.

6. MLDC does not have an interest in, use or possess real property in the District of Columbia.

7. MLDC has not engaged in any meetings or activities in the District of Columbia relating in any way to Colonial Village, Inc. or Colonial Village condominiums.

8. MLDC owns all of the stock of Colonial Village, Inc., a Delaware corporation. Colonial Village, Inc. has its own Board of Directors and its own officers, who are responsible for the management and operation of that corporation.

9. MLDC does not own or manage the condominium project known as Colonial Village in Arlington, Virginia, and MLDC has no involvement in the format, content, placement or frequency of the advertising for such property.

* * *

[Signature and Notarization Omitted In Printing]

DECLARATION OF REUBEN B. ROBERTSON

* * *

2. Shortly after the complaint was filed in this case, I was requested by counsel for the plaintiffs to accept service of process. I notified my clients of such request and was authorized to accept service for Colonial Village, Inc. only. I informed plaintiffs' counsel that I could receive service for Colonial Village, Inc. but was not authorized to accept service of process for MLDC and would not do so.

3. Exhibit 1 is a true copy of the summons which I received from plaintiffs' counsel by mail on Wednesday, November 12, 1986, together with a copy of the complaint. This summons identifies only Colonial Village, Inc. as the defendant to which the summons is directed. I did not receive any other summons from the plaintiffs or their attorneys.

4. Exhibit 2 is a true copy of the "Notice and Acknowledgment of Receipt of Summons and Complaint," which accompanied the summons and was received by me on November 12, 1986. This form identifies only Colonial Vil-

lage, Inc. as the defendant to which the service is directed. I did not receive any other notice and acknowledgment of service from the plaintiffs or their attorneys.

5. I executed the notice and acknowledgment of service form, Exhibit 2, and returned it on behalf of Colonial Village, Inc. only. Had I been advised that service was being attempted on MLDC by this form, I would not have executed it since I was not authorized to do so.

6. I am not and have never been an officer or a managing or general agent of MLDC, nor have I been otherwise authorized to receive service of process on its behalf.

[Verification and Signature Omitted In Printing]